

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
February 4, 2008

D050666 In re Marriage of Anderson

The order denying modification of spousal support is affirmed. Irion, J.; We Concur: Huffman, Acting P.J., Haller, J.

D049162 Perez v. Borucki et al.

The judgment denying Perez's writ of mandate is affirmed.

D051306 People v. Cheeks

Upon filing an abandonment of the appeal, personally signed by the defendant, the appeal is dismissed and the remittitur is ordered to issue immediately. Cal. Rules of Court, rule 8.316.)

D050611 People v. Arnold

The judgment is affirmed. O'Rourke, J.; We Concur: McConnell, P.J., Benke, J.

D050531 People v. Ganelin

The judgment is modified by replacing the four-year upper term sentence with the three-year middle term. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. Haller, J.; We Concur: Benke, Acting P.J., Huffman, J.

D049212 People v. Jones

The judgment is affirmed. Benke, Acting P.J.; We Concur: Huffman, J., Irion, J.

D052166 Elva G. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The attorney for petitioner Elva G. has notified the court that a petition for writ of mandate under California Rules of Court, rule 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is dismissed.

D052312 Jacob P. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The attorney for petitioner Jacob P. has notified the court that a petition for writ of mandate under California Rules of Court, rule 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is dismissed.

D052443 People v. Superior Court of Imperial County/Cole

The petition for writ of mandate, request for stay and response have been read and considered by Justices Benke, McIntyre and Aaron. The petition is denied.

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February 5, 2008

D049704 In re Rozzo on Habeas Corpus

The petition is denied. Certified for publication. Aaron, J.; We Concur: McConnell, P.J., McIntyre, J.,

D049859 People v. Huynh

The judgment is affirmed. Nares, J.; We Concur: McConnell, P.J., Huffman, J.

D051677 Site Management Services, Inc. v. Superior Court of San Diego County/Cingular Wireless et al.

The petition is denied.

D049705 People v. Schwartz

The judgment is affirmed. Nares, J.; We Concur: McConnell, P.J., O'Rourke, J.

D049936 Adajar et al. v. RWR Homes Inc., et al.

The order is affirmed. The plaintiffs are entitled to costs on appeal. McConnell, P.J.; We Concur: Benke, J., O'Rourke, J.

D050854 Reis v. D'Braunstein et al.

Upon written request filed by appellant, the appeal is dismissed and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).)

D049821 People v. Smith

The petition for rehearing is denied.

D049673 Mancinelli v. Rusties International, Inc.

The order is affirmed. RI is entitled to costs on appeal. Huffman, Acting P.J.; We Concur: Nares, J., O'Rourke, J.

D049356 People v. Lopez

The judgment is modified to strike the count 11 conviction and its attendant enhancements. The trial court is directed to amend the abstract of judgment accordingly and to forward an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed. Huffman, J.; We Concur: McConnell, P.J., O'Rourke, J.

D051151 In re Joseph A., a Juvenile

The appeal is dismissed as moot. McDonald, J.; We Concur: Nares, Acting P.J., O'Rourke, J.

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FOURTH APPELLATE DISTRICT
DIVISION ONE

February 5, 2008 (Continued)

D051760 DeFrence et al. v. L&L Photo Marine Inc., et al.

Pursuant to California Rules of Court, rule 8.140, the appeal filed October 01, 2007, is DISMISSED for appellants' failure to timely designate the record (Cal. Rules of Court, rule 8.121(a)).

D051643 In re Eberle on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Benke, McIntyre and Aaron. We take judicial notice of San Diego County Superior Court file Nos. SCD184145 and HC17795, petitioner's direct appeal No. D046127, and habeas petition considered with the appeal, No. D048664.

A jury convicted petitioner of rape, attempted sodomy by use of force, assault with intent to commit a felony (rape) and burglary. He admitted prior prison terms, serious felony prior convictions, and three strikes prior convictions. The court sentenced him to a total term of 75 years to life plus six years.

Petitioner appealed, and counsel filed a habeas petition that was considered with the appeal, contending the trial court erred in shackling petitioner during trial, refusing to reopen his case to present a videotaped examination of the victim, and that he was improperly convicted of both rape and assault with the intent to commit rape. We affirmed the judgment and denied the habeas petition, but reversed the conviction for assault with the intent to commit rape because the offense is a lesser included offense of rape. The California Supreme Court denied review, and petitioner's abstract of judgment was corrected by the trial court on November 29, 2006.

During petitioner's trial court proceedings, he filed two habeas petitions. In the first he complained that jail personnel were denying him health care treatment and access to the court and research materials. The court denied the petition on September 30, 2004. In the second petition, petitioner contended his right to a speedy trial was violated. The court denied the petition January 13, 2005, because his right to a speedy trial did not attach at the time of his original arrest.

After conviction and conclusion of direct appeal, petitioner brought a third habeas petition in the trial court, contending: (1) the victim's testimony was inconsistent and therefore somewhat faulty regarding the issue of identification; (2) several witnesses committed perjury when they testified; (3) the physical restraints on petitioner denied him his right to self representation; and (4) he was denied his right to a speedy trial. The trial court denied the petition because issue Nos. 1 and 2 could have been raised on direct appeal, issue No. 3 was raised and rejected on direct appeal, and issue No. 4 was raised and rejected in a prior habeas petition in the trial court.

Petitioner argues in the instant petition substantially the same arguments he presented in his last trial court petition, and adds a claim of ineffective assistance of appellate counsel. Petitioner contends: (1) the victim's testimony was inconsistent; (2) witnesses committed perjury when they testified and the prosecutor knowingly allowed the perjured testimony; (3) the physical restraints on petitioner during trial denied petitioner his right to self representation; (4)

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February 5, 2008 (Continued)

petitioner was denied his right to a speedy trial; and (5) appellate counsel was ineffective in failing to raise issues Nos. 1, 2 and 4.

As stated by the trial court, issue No. 3 was raised on direct appeal and in a habeas petition filed by counsel, and was rejected by this court in Nos. D046127 and D048664. Issue No. 3 is therefore denied as repetitive. (*In re Clark* (1993) 5 Cal.4th 750, 765, 767-768.)

Petitioner makes no attempt at establishing an exception to the procedural bar. (*In re Clark supra*, 5 Cal.4th at pp. 797-798.)

Issues Nos. 1, 2 and 4 could have been raised on direct appeal, and the claims are therefore barred as successive. (*In re Clark, supra*, 5 Cal.4th at pp. 765, 767-768; *In re Harris* (1993) 5 Cal.4th 813, 828-829.) However, because an examination of the merits of petitioner's claims is dispositive of petitioner's ineffective assistance of appellate counsel claim, we address the merits of those claims here.

In issue No. 1, petitioner raises various alleged inconsistencies in the victim's testimony. In issue No. 2, petitioner does the same with other prosecution witnesses. Although cloaked as a perjury claim and suggestive of prosecutorial misconduct, issue No. 2, like issue No. 1, is merely a factual attack on the testimony. The jury had this testimony before it, resolved whatever discrepancies may have existed, and found petitioner guilty. Petitioner may not retry the case on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.) To the extent petitioner alleges these inconsistencies were not borne out at trial, and he was somehow prevented from demonstrating those inconsistencies, petitioner may not raise those factual discrepancies here for the first time. (*Ibid.*) Moreover, even if we were to give petitioner the benefit of the doubt, and make the drastic assumption that certain testimony should have been excluded, strong physical evidence linked petitioner to the crime, which he does not dispute. In our opinion rejecting petitioner's claim that the trial court should have allowed a videotaped examination of the victim, we stated the following:

"[U]nlike many rape cases, this was not a he said/she said situation where the victim's testimony essentially constituted the case against the defendant. Eberle's sperm was found in [the victim's] vaginal and anal areas. [The victim] had genital injuries that were consistent with nonconsensual sex. She also had redness on her neck consistent with being choked. Given this overwhelming evidence, it is highly unlikely the jury would have acquitted [petitioner] had they seen the conditional examination."

(*People v. Eberle* (July 31, 2006, D046127) [nonpub. opn.].) This prejudice analysis applies with equal force to petitioner's claim in this petition. Given the direct, undisputed physical evidence linking petitioner to the crime, it is highly unlikely the jury would have acquitted petitioner even if certain witness testimony was excluded.

In issue No. 4, petitioner argues he was denied his right to a speedy trial. Although petitioner presents different dates in this petition than he presented before the trial court, the gist of his complaint is he was arrested, but not charged until 14 months later, and this violates his

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rights. We deny petitioner's claim for the same reason the trial court did: petitioner's April 9, 2003, arrest did not result in a formal indictment or information. Petitioner concedes that after arrest, the district attorney took no action on the matter, and petitioner was held for a parole revocation, and then under a civil commitment as a sexually violent predator. It was not until July 29, 2004, that the district attorney filed the information related to the criminal acts in petitioner's case. Because the right to a speedy trial did not attach until the information was filed, the 14-month delay between his initial arrest and filing does not violate petitioner's constitutional rights. (*U.S. v. Marion* (1971) 404 U.S. 307, 320; *People v. Martinez* (2000) 22 Cal.4th 750, 754-755.)

Finally, we deny petitioner's contention that appellate counsel was ineffective in failing to raise issues Nos. 1, 2 and 4. Because we have determined issues Nos. 1, 2 and 4 lack merit, counsel cannot be found deficient in declining to raise losing claims on appeal. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *Smith v. Robbins* (2000) 528 U.S. 259, 285.) Moreover, as discussed above, petitioner has not shown prejudice. (*Ibid.*)

The petition is denied.

D050449 McLeod et al. v. Vista Unified School District

The petition for rehearing is denied.

D051876 West v. Superior Court of San Diego County/People

The petition for writ of prohibition is dismissed as moot.

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February 6, 2008

D049860 Mazzone et al., v. Perrotta

The order is affirmed. Perrotta is awarded costs on appeal. McConnell, P.J.;
We Concur: O'Rourke, J., Irion, J.

D051316 People v. Young

The judgment is affirmed. Haller, J.; We Concur: Benke, Acting P.J., Irion, J.

D050375 People v. Monterosso et al.

The trial court is instructed to amend the abstract of judgment to reflect an enhancement under section 12022.53 subdivisions (c) and (e)(1) for defendant Monterosso, and to include his total credits of 1,009 days, composed of 878 actual days and 131 days of conduct credits, and to forward a copy of the abstract of judgment to the Department of Corrections and Rehabilitation. With these modifications, the judgment is affirmed. McConnell, P.J.; We Concur: Huffman, J., Nares, J.

D052022 Yamaha Motor Corporation U.S.A. et al. v. The Superior Court of San Diego County/Fort

The petition is denied. The stay issued on November 21, 2007, is vacated.

D051493 In re Alejandro A. et al., Juveniles

The judgments are affirmed. Irion, J.; We Concur: Benke, Acting P.J.; We Concur: Aaron, J.

D050955 People v. Pulley

The judgment is affirmed. Irion, J.; We Concur: Haller, Acting P.J., McIntyre, J.

D051576 In re M.S., a Juvenile

The judgment is affirmed. McDonald, J.; We Concur: Haller, Acting P.J., Irion, J.

D050401 People v. Magallanes

The judgment is affirmed. O'Rourke, Acting P.J.; We concur: Aaron, J., Irion, J.

D050532 People v. Martin

The judgment is affirmed. Benke, Acting P.J.; We Concur: Nares, J., Irion, J.

Court convened at 9:00 a.m.

Present: The Honorable Judith McConnell, Presiding Justice, and The Honorable Associate Justices Judith Haller and Joan Irion
Clerk: D. Moore

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D049432 People v. Elder

Cause called on merits. Robert E. Boyce, Esq. argued for appellant. William Wood, Deputy Attorney General argued for respondent. Mr. Boyce replied. Cause submitted.

Court recessed at 9:30 a.m. to change panel members. New panel members: The Honorable Richard Huffman, Acting Presiding Justice, and The Honorable Associate Justices Gilbert Nares and Judith Haller

D049369 Del Taco, Inc. v. 1033 Third Street Corp.

Cause called on merits. Jay R. Saltsman, Esq. argued for appellant. Christopher A. Lidstad, Esq. was present in oral argument for respondent. Cause submitted.

Court adjourned 9:53 a.m.

D050179 In re B.D. et al., Juveniles

The opinion filed January 17, 2008, is ordered certified for publication. The attorneys of record are: Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant. Susan Bookout, under appointment by the Court of Appeal, for Appellant and Minor B.D. John J. Sansone, County Counsel, John E. Philips, Chief Deputy County Counsel and J. Jeffrey Bitticks, Deputy County Counsel, for Plaintiff and Respondent. Carl Fabian, under appointment by the Court of Appeal, for Minors Adeline D., Joanna F., Israel F. and Eric F.

D048733 El Gohary v. The Colyer Institute et al.

The judgment is affirmed. Aaron, J.; We Concur: McDonald, Acting P.J., Irion, J.

D049385 White v. Alex Brown Management Services et al.

Order affirmed. Appellants to bear respondent's costs on appeal. Haller, J.; We Concur: Nares, Acting P.J., Aaron, J.

D049883 Exarhos v. Exarhos

Nicholas Exarhos's petition for rehearing is denied.

It is ordered that the opinion filed herein on January 10, 2008 is modified. (No change in judgment)

D049884 Combs v. Skyriver Communications Inc., et al.

The opinion filed January 17, 2008, is ordered certified for publication.

D050396 People v. De La Toba

The judgment is affirmed. Haller, Acting P.J.; We Concur: Aaron, J., Irion, J.

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DIVISION ONE
February 7, 2008 (Continued)

D051761 In re Cochran on Habeas Corpus

The petition is denied.

D051806 In re Fowler on Habeas Corpus

The petition is denied.

D052449 Lua v. Superior Court of San Diego County/Salzetti

The petition is denied.

D052298 In re Fowler on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Benke, McIntyre and Aaron.

This petition, No. D052298, is identical to petition No. D051806, filed October 10, 2007. This petition is therefore denied as duplicative. The petition is denied.

D052465 In re Joanna F., a Juvenile

The notice of appeal received on February 4, 2008, challenges an August 16, 2007 judgment.

There is no judgment bearing that date. Furthermore, any appeal from a judgment of that date is untimely. The case is DISMISSED.

D051549 In re Tanya F. et al., Juveniles

Judgment affirmed. Irion, J.; We Concur: Huffman, Acting P.J., Aaron, J.

D051850 In re Batie on Habeas Corpus

The petition is denied.

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February 8, 2008

D049183 San Diego Convention Center Corporation Inc., v. Brady

The judgment is affirmed. San Diego Convention Center Corporation, Inc. is awarded costs on appeal. O'Rourke, J.; We Concur: Benke, Acting P.J., Huffman, J

D052480 Hawkshaw v. Superior Court of San Diego County/Genica Corporation

The petition is denied.

D050655 People v. Edwards

The petition is denied.

D051968 People v. Martin

Upon filing an abandonment of appeal, the appeal is dismissed and the remittitur is ordered to issue immediately.

D051027 Geib v. Cacatian et al.

Upon written request filed by appellant, the appeal is dismissed and the remittitur is ordered to issue immediately as to Joseph Tanalski only.

D051518 In re Angel P., a Juvenile

Judgment affirmed. McDonald, J.; We Concur: Nares, Acting P.J., Haller, J.

D048558 Anderson v. Board of Trustees of California State University et al.

The judgment and orders, including the summary adjudication and the JNOV order, are affirmed. Costs are awarded to University. Huffman, Acting P.J.; We Concur: Nares, J., McIntyre, J.

D051538 Thomas v. Herring Broadcasting Company, Inc.

Upon written request filed by appellant, the appeal is dismissed and the remittitur is ordered to issue immediately.

D051121 In re Jessie O., a Juvenile

The appeal is dismissed as moot. Huffman, J.; We Concur: McConnell, P.J., Haller, J.

D052479 Kristen H. v. Superior Court of San Diego County/People

The petition is denied.

D051225 In re E.D., a Juvenile

The order is affirmed. McIntyre, Acting P.J.; We Concur: Aaron, J., Irion, J.

D050556 People v. Bland

The judgment is affirmed. McDonald, J.; We Concur: Benke, Acting P.J., Haller, J.

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D050965 In re Hugo R., a Juvenile

The juvenile court is directed to correct the clerical errors discussed in footnote 2, ante. The order, as modified, is affirmed. McConnell, P.J.; We Concur: McDonald, J., O'Rourke, J.

D052441 Starbucks Corporation v. The Superior Court of San Diego County/Chou et al.

The petition is denied.

D052376 Chavez v. Superior Court of San Diego County/Hooper

The petition is denied.

D051731 In re Dailey on Habeas Corpus

The petition is denied.